

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT E. KING

Petitioner,

v.

Civil Action No. 21-P-198  
The Honorable Joanna I. Tabit

THE WEST VIRGINIA HOUSE OF DELEGATES, and  
THE WEST VIRGINIA HOUSE GOVERNMENT  
ORGANIZATION COMMITTEE

RECEIVED

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Respondents.

Attorney General's Office

**ORDER DISMISSING COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

The matter comes before the Court on the *Complaint for Declaratory and Injunctive Relief* (hereinafter, the “*Complaint*”) filed by Petitioner, Robert E. King (“Petitioner”), on June 9, 2021, as well as the *Motion to Dismiss Complaint for Declaratory and Injunctive Relief* (hereinafter, the “*Motion to Dismiss*”) filed on August 10, 2021, by Respondents, the West Virginia House of Delegates (“House”) and the West Virginia House of Delegates Government Organization Committee, (“GovOrg Committee”), pursuant to Rule 12(b)(1) and (6) of the West Virginia Rules of Civil Procedure.

After careful consideration of the *Complaint*, the *Motion to Dismiss* and Memorandum in Support of said *Motion*, the arguments presented by counsel, and the pertinent legal authorities, this Court finds and concludes that the Complaint is jurisdictionally insufficient and fails to state a claim upon which relief may be granted. This Court further finds and concludes that Petitioner lacks standing, and thus, dismissal of this action is necessary. This Court further finds and concludes that the Complaint must be dismissed because it fails to articulate any cognizable cause of action upon which relief can be granted.

The arguments and objections of the parties are hereby preserved upon the record.

### **FINDINGS OF FACT**

This Court makes the following findings of fact:

1. The West Virginia Legislature convened for the 2021 Regular Session on January 13, 2021, before adjourning to reconvene on February 10, 2021.<sup>1</sup>

2. H.B. 2890 (the “Bill”) was introduced by three Delegates on March 3, 2021, and Roger Hanshaw, the Speaker of the House of Delegates (“Speaker”), referred it for consideration to the House Committee on Technology and Infrastructure (“TI Committee”), then to the GovOrg Committee.<sup>2</sup>

3. On March 18, 2021, the TI Committee reported H.B. 2890 back, with amendment, with the recommendation that it pass, as amended, but that the Bill first be referred to the GovOrg Committee.<sup>3</sup> In accordance with the Speaker’s former direction, H.B. 2890 was then referred to the GovOrg Committee.<sup>4</sup>

4. The GovOrg Committee subsequently added H.B. 2890 as an item on the Agenda for a public meeting to be held on March 23, 2021, in the State Capitol, Room 215-E. The GovOrg Committee discussed H.B. 2890 during its March 23, 2021, public meeting as planned, and the members in attendance voted to approve a committee substitute for H.B. 2890.

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<sup>1</sup> See Journal of the House of Delegates (January 13, 2021), pages 3 (1) and 74 (72), at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-01-13-00.pdf?p=4820](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-01-13-00.pdf?p=4820) (last accessed March 8, 2022). This and other details regarding the legislative history regarding H.B. 2890 are matters of public record within the Court’s notice.

<sup>2</sup> See Journal of the House of Delegates (March 3, 2021), pg. 19 (359), at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-03-22.pdf?p=3825](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-03-22.pdf?p=3825) (last accessed March 8, 2022).

<sup>3</sup> See Journal of the House of Delegates (March 18, 2021), pg. 5 (713) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-18-37.pdf?p=2347](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-18-37.pdf?p=2347) (last accessed March 8, 2022).

<sup>4</sup> *Id.*

5. On March 24, 2021, the GovOrg Committee reported the committee substitute for H.B. 2890 back to the full House with the recommendation that it pass.<sup>5</sup> However, as is the case with all proposed/active legislation, a committee's recommendation on a bill to the full chamber is just that: a recommendation. See Rule 81, Rules of the House of Delegates, <https://www.wvlegislature.gov/House/rules.cfm> (last accessed March 8, 2022) ("Reports of committees shall be advisory only.").

6. After a committee makes a recommendation on a bill, the full chamber—here the House of Delegates—must still vote on the bill after debate and the bill having been on 3 days of reading. See W.Va. Const., art. VI §29; Rule 102, Rules of the House of Delegates, <https://www.wvlegislature.gov/House/rules.cfm> (last accessed March 8, 2022). Thus, committee action is only one advisory step—not final action—on a piece of legislation by a single chamber, let alone by the full Legislature later to be signed (or vetoed) by a Governor.

7. On March 25, 2021, H.B. 2890 was read for the first time in the House and advanced to second reading.<sup>6</sup>

8. On March 26, 2021, H.B. 2890 was read in the House for a second time and advanced to third reading.<sup>7</sup>

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<sup>5</sup> See Journal of the House of Delegates (March 24, 2021), 7 (869) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-24-43.pdf?p=2107](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-24-43.pdf?p=2107) (last accessed March 8, 2022).

<sup>6</sup> See Journal of the House of Delegates (March 25, 2021), pp. 26-27 (918-919) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-25-44.pdf?p=6311](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-25-44.pdf?p=6311) (last accessed March 8, 2022).

<sup>7</sup> See Journal of the House of Delegates (March 26, 2021), pg. 36-37 (964-65) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-26-45.pdf?p=4387](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-26-45.pdf?p=4387) (last accessed March 8, 2022).

9. On March 29, 2021, H.B. 2890 was read in the House for a third time, whereafter the House voted to pass the Bill, with 75 yeas, 24 nays, and 1 absent and not voting.<sup>8</sup> The Speaker then declared the bill passed and ordered the Clerk of the House (“Clerk”) to communicate the House’s action to the Senate and request the Senate’s concurrence.<sup>9</sup>

10. On March 30, 2021, H.B. 2890 was introduced in the Senate, and Senate President Craig Blair referred it for consideration to the Senate Committee on Government Organization (“Senate GovOrg Committee”), then to the Senate Committee on the Judiciary (“Senate Judiciary Committee”).<sup>10</sup>

11. On April 2, 2021, the Senate GovOrg Committee reported H.B. 2890 back, with a title amendment, with the recommendation that it pass, as amended, but that the Bill first be referred to the Senate Judiciary Committee per the Senate President’s original double committee reference.<sup>11</sup> However, Senator Charles S. Trump IV, the chair of the Senate Judiciary Committee, requested and obtained the Senate’s unanimous consent to dispense with the second committee reference.<sup>12</sup>

12. Via a letter signed by one of Petitioner’s counsel that same day (April 2, 2021), the American Civil Liberties Union of West Virginia (“ACLU-WV”) asserted that the Respondents

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<sup>8</sup> See Journal of the House of Delegates (March 29, 2021), pp. 11-12 (999-1000) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-03-29-48.pdf?p=3262](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-03-29-48.pdf?p=3262) (last accessed March 8, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> See Journal of the Senate (March 30, 2021), pg. 8 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-03-30-49.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-03-30-49.pdf) (last accessed March 8, 2022).

<sup>11</sup> See Journal of the Senate (April 2, 2021), pg. 10 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-04-02-52.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-04-02-52.pdf) (last accessed March 8, 2022).

<sup>12</sup> *Id.*

had violated the West Virginia Open Governmental Proceedings Act (“Open Meetings Act”).<sup>13</sup> Among other things, the letter referenced an unidentified person who allegedly had been “unable to hear substantial portions of debate and discussion” during the House GovOrg Committee’s aforementioned March 23, 2021, meeting because “the [internet broadcast] audio feed was not operable.”<sup>14</sup>

13. The aforesaid April 2, 2021, letter further indicated that ACLU-WV intended to take legal action against the House and the Office of the Clerk related to these alleged technical difficulties that would include “a request for a court order stating that any decision made by the committee in the March 23, 2021 meeting be nullified.”<sup>15</sup>

14. H.B. 2890 was read for the first time in the Senate on April 5, 2021, and ordered to second reading.<sup>16</sup>

15. On April 6, 2021, H.B. 2890 was read for the second time in the Senate and ordered to third reading.<sup>17</sup>

16. On April 7, 2021, H.B. 2890 was read in the Senate for a third time before the Senate voted to pass the Bill with an amended title, with 26 yeas and 8 nays.<sup>18</sup> The Senate President

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<sup>13</sup> See Complaint, Exhibit E.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Journal of the Senate (April 5, 2021), pg. 76 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-04-05-55.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-04-05-55.pdf) (last accessed March 8, 2022).

<sup>17</sup> See Journal of the Senate (April 6, 2021), pp. 29-30 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-04-06-56.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-04-06-56.pdf) (last accessed March 8, 2022).

<sup>18</sup> See Journal of the Senate (April 7, 2021), pg. 28 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-04-07-57.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-04-07-57.pdf) (last accessed March 8, 2022).

then declared the bill passed and ordered the Clerk of the Senate (“Senate Clerk”) to communicate the Senate’s action to the House and request the House’s concurrence.<sup>19</sup>

17. On April 7, 2021, the House voted to concur with the Senate’s title amendment of H.B. 2890, with 53 yeas, 34 nays, and 13 absent and not voting.<sup>20</sup> The Speaker then declared the bill passed and ordered the Clerk to communicate the House’s action to the Senate.<sup>21</sup>

18. On April 22, 2021, the Joint Committee on Enrolled Bills (“Joint Committee”) submitted a report to the Governor indicating that H.B. 2890 had been duly passed by the both the Senate and the House, and the Governor subsequently approved the Bill on April 26, 2021,<sup>22</sup> with the new law to take effect on July 6, 2021.

19. Petitioner is a West Virginia resident and the sole proprietor of R & R Transit, a Morgantown-based Limited Liability Company that provides luxury limousine transportation services.<sup>23</sup>

20. Respondent, House is one of two chambers in the West Virginia Legislature and is a “governing body” as that term is defined in West Virginia Code §6-9A-2(4). Thus, the Respondent, House is subject to the terms of the Open Meetings Act.

21. Respondent, GovOrg Committee is a standing committee within the Respondent, House and is a “governing body” as that term is defined in West Virginia Code §6-9A-2(4). Thus, the Respondent, GovOrg Committee is subject to the terms of the Open Meetings Act.

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<sup>19</sup> *Id.*

<sup>20</sup> See Journal of the House of Delegates (April 7, 2021), pp 80-81 (1724-1725) at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/h\\_journal/hdj2021-04-07-57.pdf?p=7727](https://www.wvlegislature.gov/bulletin_board/2021/rs/h_journal/hdj2021-04-07-57.pdf?p=7727) (last accessed March 8, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> See Journal of the Senate (April 10, 2021), pp. 489-491, 524 at [https://www.wvlegislature.gov/bulletin\\_board/2021/rs/s\\_journal/sdj2021-04-10-60.pdf](https://www.wvlegislature.gov/bulletin_board/2021/rs/s_journal/sdj2021-04-10-60.pdf) (last accessed March 8, 2022).

<sup>23</sup> See Complaint, ¶1.

22. In or around the beginning of March 2021, the Petitioner learned that H.B. 2890 had been introduced in the Legislature and was concerned that it could potentially affect his business, R & R Transit, if it was enacted.

23. Respondent, GovOrg Committee's March 23, 2021 meeting was conducted at the West Virginia State Capitol in Room 215-East, beginning around 2:00 pm.<sup>24</sup> An audio-stream of the meeting was also broadcast over the internet, although the Petitioner and his affiants stated that it was impaired by technical difficulties.<sup>25</sup>

24. The Petitioner subjectively believed that he would not be able to gain access to the Capitol in order to physically attend the GovOrg Committee's March 23, 2021 meeting due to COVID-19-related restrictions, and that listening to the internet broadcast constituted the only "meaningful access" to the Committee's deliberations that was available to him.<sup>26</sup>

25. The Petitioner acknowledged in his Complaint that the public had access to the State Capitol on that date.<sup>27</sup>

26. The February 8, 2021 press release issued by the Speaker's Office, which was referenced in the Complaint at ¶13 and attached to it as Exhibit A, stated that any member of the public with an "appointment" in the State Capitol would have access to the building.<sup>28</sup>

27. At the very least, a limited number of members of the media—whose numbers within the building proper have not been alleged to be limited—were permitted to attend the meeting in question.

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<sup>24</sup> See Complaint, ¶20.

<sup>25</sup> See Complaint, ¶¶27-34.

<sup>26</sup> See Complaint, ¶¶21-24.

<sup>27</sup> See Complaint, ¶13.

<sup>28</sup> See Complaint, Ex. A.



28. The Petitioner has not provided a factual basis for his assertion that the GovOrg Committee's March 23, 2021 meeting violated W.Va. Code §6-9A-3(a) because it was allegedly conducted "without open access to the public."<sup>29</sup>

### **CONCLUSIONS OF LAW**

After careful consideration of the *Complaint*, the *Motion to Dismiss*, the Memorandum in Support of said *Motion*, and the pertinent legal authorities, this Court makes the following conclusions of law:

1. A circuit court must "address[] problems regarding subject-matter jurisdiction" with "urgency" because where jurisdiction is lacking, any action it takes is void. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017).

2. The Petitioners bear the burden of establishing jurisdiction in this matter. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4<sup>th</sup> Cir. 1999); *cf.* Syl. Pt. 3, *State ex. rel. TermNet Merchant Serv., Inc. v. Jordan*, 217 W. Va. 696, 697, 619 S.E.2d 209, 211 (2005).

3. And whenever jurisdiction is lacking, a court "must take no further action in the case other than to dismiss it from the docket." *Cf.* Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975).

4. In addition to dismissal for jurisdictional failings, the *Complaint* also must be dismissed under Rule 12(b)(6) of the Rules of Civil Procedure because the Plaintiff failed to "allege[] sufficient facts" to "outline the essential elements" of his claims, *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2], at 384-88 (4<sup>th</sup> ed. 2012)), and because it appears that he can prove no set

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<sup>29</sup> See *Complaint*, ¶47.



of facts to support his requested relief. Syl. Pt. 3, *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 47, 750 S.E.2d 263, 264 (2013).

5. A preliminary injunction is “an extraordinary remedy involving the exercise of a very far-reaching power.” *McClure v. Manchin*, 301 F. Supp. 2d 564, 569 (N.D.W. Va. 2003) (quoting *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4<sup>th</sup> Cir. 1999)). Such relief should be granted “in the limited circumstances which clearly demand it.” *Id.*

6. To determine whether a preliminary injunction should issue, courts require a “clear showing of a reasonable likelihood of irreparable harm” and apply a multi-factor “balancing of hardship test” which considers: “(1) the likelihood of irreparable harm to the [petitioners] without the injunction; (2) the likelihood of harm to the [respondent] with an injunction; (3) the [petitioner’s] likelihood of success on the merits; and (4) the public interest.” *N.E. Nat. Energy LLC v. Pachira Energy LLC*, 844 S.E.2d 133, 137 (W. Va. 2020) (quoting *State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996)).

7. The Plaintiff “bear(s) the burden of proving that the factors favor granting the injunction.” *McClure*, 301 F. Supp. 2d at 569.

# **I. THE COMPLAINT FAILS TO ESTABLISH SUBJECT MATTER JURISDICTION AND MUST BE DISMISSED.**

8. The Complaint is jurisdictionally defective in its entirety and must be dismissed for lack of standing. As a threshold matter of subject matter jurisdiction, litigants must always satisfy “the irreducible constitutional minimum of standing” to invoke this Court’s jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

9. Standing is composed of three elements:

First, the party attempting to establish must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must also

be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

10. The Complaint does not establish the elements described above and, consequently, fails to establish standing.

11. First, the Complaint does not allege a “concrete and particularized” injury that is “actual or imminent.” *Id.* In fact, the Complaint does not present any particular allegation of actual harm to the Plaintiff at all. It is simply unclear what actual concrete injury has been suffered by the Plaintiff.

12. As a logical and unavoidable consequence of this failure to establish that the Plaintiff has suffered an injury-in-fact, the Complaint does not—cannot—demonstrate a causal connection between some unclear, indistinct, and non-particularized injury and “the conduct forming the basis of [this] lawsuit.” *Id.*

13. Similarly, the Complaint fails on standing’s third element because there is no way that “a favorable decision of the court” could provide redress to some conjectural or hypothetical injury. *Id.* Thus, due to lack of standing and subject matter jurisdiction alone, the Complaint must be dismissed.

## **II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH THE REQUESTED RELIEF CAN BE GRANTED.**

14. “If the complaint fails to allege a cognizable violation of constitutional or statutory rights it also has failed to state a claim upon which relief can be granted.” *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 663, 783 S.E.2d 75, 84 (2015) (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n.12, 479 S.E.2d 649, 659 n.12 (1996)); see also *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr.*, 492 F.3d 1158, 1163 (10th Cir. 2007) (“After all,

these are, very basically put, the elements that enable the legal system to get weaving – permitting the defendant sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits.”).

**a. The Complaint fails to set forth a cause of action as a basis for relief.**

15. The Complaint also must be dismissed because it fails to articulate any cognizable causes of action. The factual allegations, even if taken as true, fail to demonstrate that the Respondents violated any substantive provisions of the Open Meetings Act set forth in Section 6-9A-3.

16. The “Legal Authority and Discussion” section of the Complaint primarily focuses on the language found in the first section of the Open Meetings Act (W.Va. Code §6-9A-1) entitled “Declaration of legislative policy.” However, this is a general statement of the intent of the Open Meetings Act’s substantive requirements, which appear in the Act’s subsequent sections. In other words, §6-9A-1 is aspirational in nature and establishes no specific statutory obligations on governing bodies that would create a cognizable cause of action. *See Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992) (General regulatory admonitions do not constitute the type of substantial and clear public policy on which a retaliatory discharge claim can be based.).

17. The aspirational nature of §6-9A-1 is further made clear by the notable absence of the word “shall” from that section. *C.f.* Syl. Pt. 1, *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982) (“It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.”). It is §6-9A-3, entitled “Proceedings to be open; public notice of meetings,” that establishes nine substantive statutory requirements with which governing

bodies must comply or find themselves subject to judicial accountability pursuant to §6-9A-6. *See e.g. Miller v. Teets*, 2014 WL 11353178 (W.Va.Cir.Ct.) (Trial Order) (August 8, 2014) (“W.Va. Code §6-9A-3 is the portion of the (Open Meetings Act) that sets out the meeting requirements for government bodies.”), *rev’d on other grounds, Teets v. Miller*, 237 W.Va. 473, 788 S.E.2d 1 (2016).

18. Because the Petitioner has acknowledged that the public had access to the State Capitol on March 23, 2021, it must be held that the GovOrg committee meeting on that date was “open to the public” as mandated by Section 6-9A-3(a).<sup>30</sup> At worst, the Complaint paints a picture reflecting that members of the media—whose numbers within the building proper have not been alleged to be limited—were permitted to attend the meeting in question.

19. Although the House arranged to audio stream committee meetings over the internet, this effort to provide the public with greater access to its legislative committee meetings was not mandated by the Open Meetings Act, and any technical difficulties that may have affected the Petitioner’s ability to monitor the GovOrg Committee’s deliberations during its March 23, 2021, meeting did not violate that statute.

20. Moreover, the Complaint cites no legal authority supporting the assertion that technical issues related to the online audio stream of a governing body’s meeting constitutes a substantive violation of the Open Meetings Act, particularly considering that members of the public, of which the press are a part, could attend that meeting in person.

21. Likewise, the Petitioner presented no precedential case law supporting the contention that a limitation on his personal ability to listen online to the Committee’s deliberations during the March 23, 2021, meeting obviated the fact that members of the public, of which the

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<sup>30</sup> *See* Complaint, ¶13.

press are a part, could access the conference room—with cameras in tow—while the meeting was taking place.

22. The Complaint’s allegations, even when taken as true, are insufficient to state a claim for relief, and, therefore, dismissal is warranted here.

**b. The Plaintiff can prove no set of facts to support his requested relief.**

23. The Supreme Court of Appeals has specifically held:

“A finding that a violation [of the Open Meetings Act] occurred, however, does not necessarily require invalidation of all actions taken during or following from the wrongfully held private meeting. The relevant statutory authority, [West Virginia Code Section] 6-9A-6[], leaves such matters in the court’s discretion.”

*McComas v. Board of Educ. of Fayette County*, 197 W.Va. 188, 201, 475 S.E.2d 280, 293 (1996).

24. For purposes of the Open Meetings Act, the word “decision” means “any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of **the governing body** is required at any meeting at which a quorum is present.” W.Va. Code §6-9A-2(1) (emphasis added).

25. The term “governing body” is defined in the Open Meetings Act as:

the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members; **for the purposes of this article, a governing body of the Legislature is any standing, select or special committee**, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

*See* W. Va. Code §6-9A-2(4) (emphasis added).

26. Likewise, the Open Meetings Act defines the term “public agency” as:

any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, **authorized by law to exercise some portion of executive or legislative power**. The term “public agency” does not include courts created by

article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

*See* W. Va. Code §6-9A-2(7) (emphasis added).

27. The “decision” or “official action” to which the Petitioner objects in this case is the GovOrg Committee’s vote (as a “governing body”) during its March 23, 2021, meeting to recommend that the House (as a “public agency”) pass H.B. 2890 because that meeting and vote encountered circumstances where technical issues in the audio stream may have interfered with Petitioner’s ability to listen to the discussions remotely, despite the fact that members of the media and other members of the general public were not excluded from the State Capitol or that meeting.

28. Even if technical problems with the audio stream of the GovOrg Committee’s March 23, 2021, meeting had constituted a violation of the Open Meetings Act— notwithstanding the fact that the public, especially media members, could access the relevant hearing room at the time—the strictest remedy this Court could impose to rectify the violation pursuant to West Virginia Code Section 6-9A-6 would be annulment of the “decision” made in violation of the Act.

29. In this case, that decision is solely *the GovOrg Committee’s vote recommending that the House pass H.B. 2890*. In other words, only the committee’s recommendation on the bill— which is merely an advisory report per the House’s own rules— would be undone.

30. However, the remedy the Petitioner requests in his Complaint far exceeds the scope of the enforcement powers vested in this Court by the Open Meetings Act, as it would require this Court to (a) annul the full House’s March 29, 2021, vote to approve H.B. 2890; (b) annul the Senate’s April 7, 2021, vote to approve H.B. 2890; (c) annul the full House’s April 7, 2021, vote to approve H.B. 2890 with the Senate’s title amendment; (d) annul the Governor’s April 22, 2021, approval of H.B. 2890; and (e) annul all similar actions by the House, Senate, and Governor

relative to the other bills in the Complaint's request for relief (i.e. H.B. 2773, H.B. 2962, and H.B. 3002).

31. Such relief would be extreme and excessive, even accepting the Complaint's allegations as true. A request to invalidate a swath of new legislation because of technical complications with a committee meeting audio stream is severe; such broadcast is not required by statute, and a committee recommendation is not a prerequisite to legislative action.

32. Members of the public had multiple opportunities to participate in the legislative process leading up to passage of H.B. 2890 by both the House and Senate, as well as the Governor's approval of the bill. The Complaint presents no allegations that similar technical issues interfered with his—or the public's—ability to remotely monitor the TI Committee's deliberations on the bill during its March 17, 2021, meeting; the full House's deliberations before its vote to pass the bill on March 29, 2021; the Senate GovOrg's deliberations during its April 1, 2021, meeting; or the full Senate's deliberations before its vote to approve the bill on April 7, 2021. Likewise, there are no allegations regarding any attempts by the Petitioner to monitor any of those subsequent deliberations on H.B. 2890 either in person at the State Capitol or remotely.

33. The Complaint did not allege that the Petitioner made any attempt to communicate any of his concerns about the language in H.B. 2890 to any elected or staff member of the House or Senate before those governing bodies deliberated on and voted to pass H.B. 2890, or to communicate such concerns to the Governor or his staff before the Governor approved the bill.

34. The possible effects of the technical issues that arose during the GovOrg Committee's March 23, 2021, meeting on the public's ability to monitor the legislative processes surrounding the consideration and eventual enactment of H.B. 2890 appear to have been minimal.



35. Even if a violation of the Open Meetings Act had occurred during the GovOrg Committee's March 23, 2021, meeting, there is no legal basis to invalidate all subsequent actions—by the House, Senate, and Governor—in the respective legislative histories of H.B. 2890, H.B. 2773, H.B. 2962, and H.B. 3002 by enjoining enforcement of their provisions and otherwise declaring them void.

36. The Petitioner has not demonstrated his likelihood of success on the merits. Rather, he has failed to state a claim for relief under the Open Meetings Act. His inability to meet the burden of demonstrating this factor is fatal to his request for injunctive relief. *Morrissey v. W. Va. AFL-CIO*, 239 W. Va. 633, 639, 804 S.E.2d 883, 889 (2017). Thus, dismissal of this matter is warranted under Rule 12(b)(6) of the Rules of Civil Procedure.

### **DISPOSITION**

This Court **FINDS AND CONCLUDES** that the Petitioner has not met his burden of proving the factors favoring the grant of injunctive relief. The Petitioner has not proven that a concrete and particularized injury exists, or that any causal relationship exists between such injury and “the conduct forming the basis of [this] lawsuit,” and the Complaint fails to articulate any cognizable causes of action. Thus, this Court lacks jurisdiction to consider this matter because the Petitioner lacks standing. The Complaint's factual allegations, even if taken as true, fail to demonstrate that the Respondents violated any substantive provisions of the Open Meetings Act set forth in Section 6-9A-3. Thus, the Complaint fails to state a claim for relief under the Open Meetings Act. Accordingly, the Petitioners cannot succeed on the merits of either count. Their failure to demonstrate likelihood of success on the merits is fatal to their request for a preliminary injunction; and it necessitates the dismissal of the Complaint.

Therefore, the Respondents' August 10, 2021, *Motion to Dismiss* is hereby **GRANTED**.

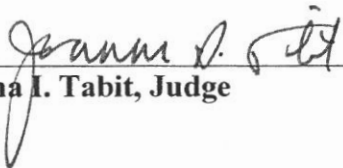
The request for injunctive relief is hereby **DENIED** and the *Complaint* is **DISMISSED IN ITS ENTIRETY** pursuant to Rule 12(b)(1) and (6) of the West Virginia Rules of Civil Procedure.

The objections of all parties are noted for the record and preserved.

The Clerk is directed to send an attested copy of this *Order Dismissing Complaint for Declaratory and Injunctive Relief* to all parties or their counsel of record.

**This is a final order.**

ENTERED this 21<sup>st</sup> day of March 2022.

  
Joanna I. Tabit, Judge

**PREPARED BY:**

**PATRICK MORRISEY  
ATTORNEY GENERAL**

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21  
DAY OF MARCH 2022  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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*Counsel for Respondents,*

*The West Virginia House of Delegates and*

*West Virginia House of Delegates Government Organization Committee*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT E. KING

Petitioner,

v.

THE WEST VIRGINIA HOUSE OF DELEGATES, and  
THE WEST VIRGINIA HOUSE GOVERNMENT  
ORGANIZATION COMMITTEE

Respondents.

2022 MAR 21 AM 11:49

JOANNA I. TABIT, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 21-P-198  
The Honorable Joanna I. Tabit

RECEIVED

MAR 23 2022

Attorney General's Office

**NOTICE OF SUBMISSION OF ORDER**

In accordance with the Court's January 26, 2022, directives and Rule 24.01(c) of the West Virginia Trial Court Rules, you are hereby notified that the undersigned counsel has tendered the attached order entitled "*Order Dismissing Complaint for Declaratory and Injunctive Relief*" to the Court. Pursuant to Rule 24.01(c), you may note any objections or exceptions to this order by notifying the Honorable Joanna I. Tabit, in writing, within five (5) days of the order's receipt. If you have "any objections regarding the wording or content of" the order, you "have an affirmative duty" to contact the undersigned counsel prior to contacting the Court to "seek a resolution of the conflict." W. Va. T.C.R. 24.01(d). If it has received no objections within five (5) days, the Court may consider the order for entry.

Date: March 9, 2022